

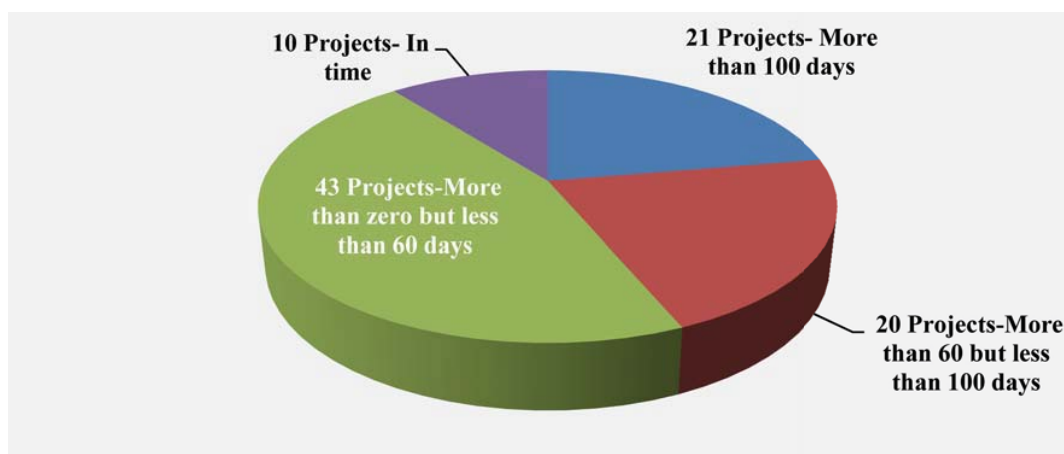
Chapter - 5

Execution of Projects

5.1 Delay in signing of Concession Agreement (CA)

Once the bidder for the project is finalized by NHAI, LOA is issued and the concessionaire has to sign CA within 45 days of LOA. However, neither MCA nor draft concession agreement, which is part of RFP documents, contained any provision for imposition of penalty for delay. **Annexure-1** gives the status of delays in signing CA beyond the prescribed period of 45 days. Out of 94 projects reviewed, delay in 21 projects in signing concession agreements ranged between more than 100 days (Bangalore-Hoskote Mulbagul) and 373 days (end of Durg Bypass).

Chart 6: Delay in signing of CA



MoRTH accepted (September 2014) the delays and stated that before signing the agreements, the concessionaire had to create a Special Purpose Vehicle (SPV) which involved preparation of various legal documents and examination thereof, which was a time consuming process. MoRTH, further, also agreed that in the absence of penalty clause, NHAI could not levy damages on concessionaire.

The reply ignores the fact that the procedure for formation of SPVs was well known to successful bidders as well as to NHAI, and that delays in signing of CA add to the overall delay in execution of projects.

5.2 Preconstruction activities/Conditions precedent to be fulfilled before financial closure/appointed date.

As per Article 4.1.2 of MCA, the conditions precedent to be fulfilled by NHAI would be deemed to have been fulfilled when NHAI shall have:

- Procured for the concessionaire the Right of Way (RoW) to the site in accordance with the provisions of Article 10.3.1 (Article 10.3.1 read with the Article 10.3.2 stipulates at least 80 *per cent* RoW of the total area of the site required and necessary for the project);
- Procured approval of Railway authorities in the form of a general arrangement drawing that would enable the concessionaire to construct road overbridges/underbridges at level crossings on the project highway in accordance with the Specifications and Standards and subject to the terms and conditions specified in such approval; and
- Procured all applicable permits relating to environmental protection and conservation of the site.

There were delays and deficiencies on the part of NHAI in complying with the above precedent conditions. The cases are discussed below:

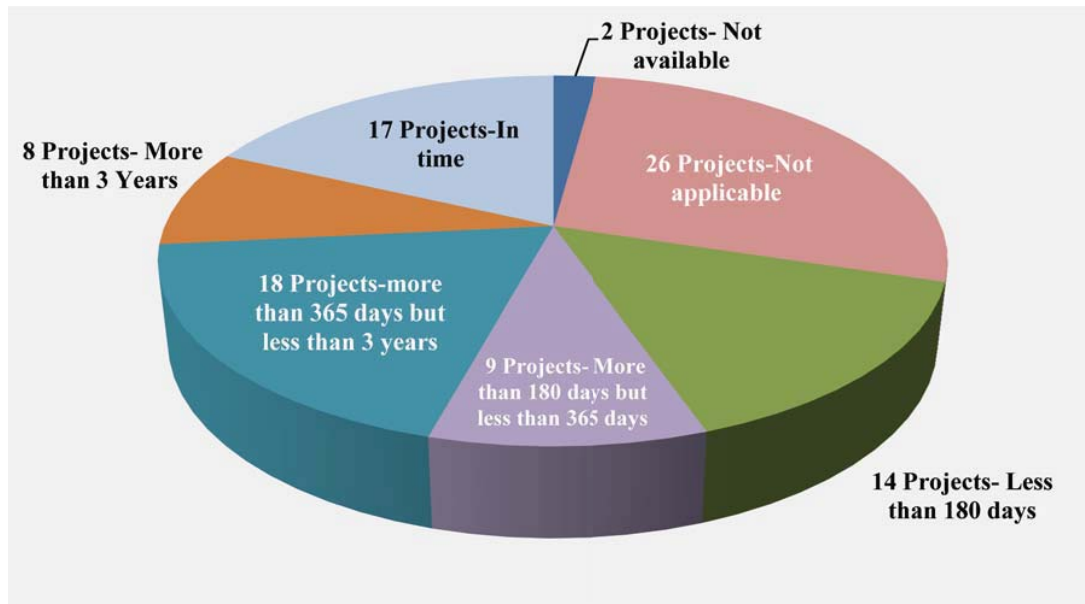
5.2.1 Right of way and vacant access to the site

Though the most important condition precedent is handing over RoW by NHAI, most of the projects scrutinized in Audit were either delayed or held up for delay in land acquisition. While contracts were awarded by NHAI on the rationale that major portion of land in shape of existing RoW (i.e. the road to be upgraded) was available, construction activities could not be started/completed due to failure of NHAI in making available the entire land required for the projects. NHAI did not provide project-wise details of land yet to be provided to the concessionaire and these details were also not readily accessible from records made available to Audit. As land was acquired in piecemeal at different times, Audit was unable to quantify the impact of delays in land acquisition. However, examination in Audit revealed that out of 94 projects reviewed, NHAI handed over land to the concessionaire on appointed date in 31 projects. Audit further noticed that NHAI did not hand over stipulated quantum of land to concessionaires in 17 projects while details of land handed over were not available in the remaining 46 projects. MoRTH in their reply (September 2014) has admitted to delays in complying with conditions precedent.

5.2.2 Approval of ROBs/RUBs.

Audit noticed delays ranging from 100 days (Barasat-Krishnagar) to 1946 days (Vijayawada-Chilakaluripet) from the scheduled date (**Annexure 1**) in obtaining approval of ROBs / RUBs in 94 projects reviewed. The position is depicted in Chart 7 below:

Chart 7: Delay in approval of ROBs/RUBs



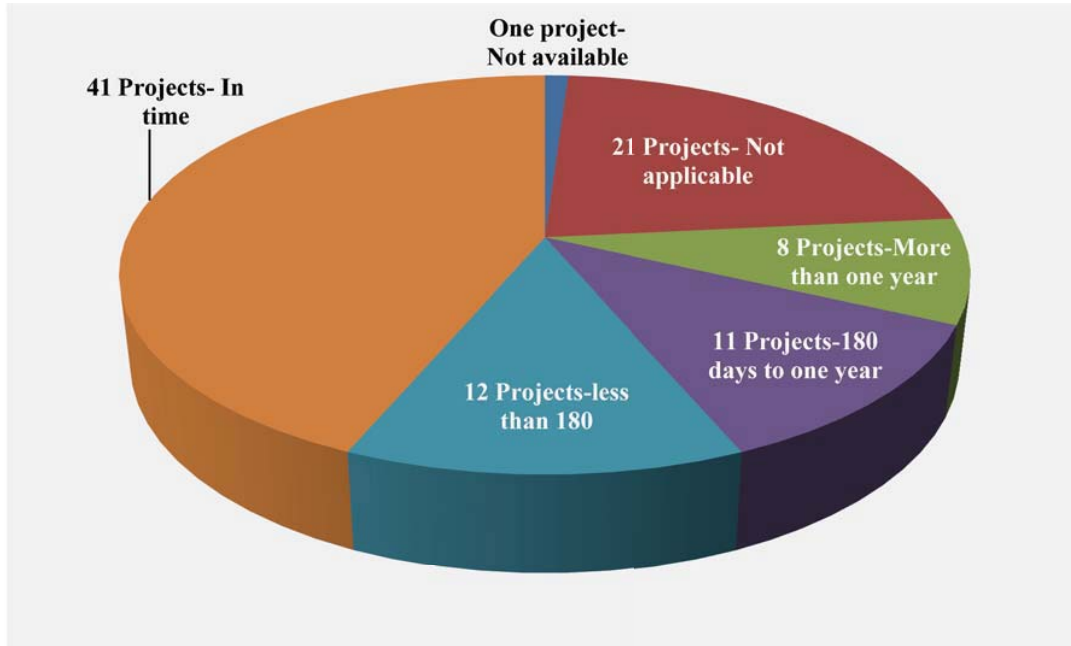
5.2.3 Environmental Clearance

In 21 projects, environment clearance was not required, while in one project information regarding environment clearance was not made available by NHAI. In 31 out of the remaining 72 projects, delay in obtaining environment clearance ranged from 26 days (Vadape-Gonde) to 1350 days (MP/MH Border-Nagpur including construction of Kamptee-Kanhan and Nagpur bypass) (**Annexure 1**).

It was also noticed that even after issue of instructions by MoRTH vide OM dated 15 July 2011 to make the Environmental Clearance as a condition precedent before Appointed Date, NHAI awarded four¹³ projects without obtaining environmental clearance in advance. In the absence of such clearance, Appointed Date had not been fixed as yet (March 2014). Delays in obtaining environmental clearance were as shown in Chart 8 below:

¹³ (i) Yamunanagar-Panchkula (ii) Aurangabad-Barwa Adda (iii) Mahulia-Kharagpur (iv) Kishangarh-Ahmedabad

Chart 8: Delay in obtaining environmental clearance



MoRTH accepted the delay (September 2014) and explained that they had no control over land acquisition since this was a State subject. It was further stated that in case of ROB/RUB, Railways were responsible for approving General Arrangement Drawings (GAD) and the process was long drawn. As regards delays in obtaining environmental/forest clearances, it was explained that since such clearances are accorded by the respective Ministries, the process took a long time.

The reply of NHAI highlighted the fact that NHAI was unable to resolve these bottlenecks even after more than 18 years of its operations and after more than seven years since the NHAI started (2006) awarding projects in PPP Mode. This also indicated a gap in synchronization of activities and coordination between Government agencies. Delays on account of environmental clearance and land acquisition led to increase in cost of projects apart from affecting the revenue stream of the GoI in premium projects. Further, status of land acquisition indicated ineffectiveness and deficiencies of independent units set up by NHAI for the purpose. As regards ROB/RUB approvals, NHAI did not furnish stage wise details of drawings submitted by concessionaires, approval of IE/NHAI thereto, submission of the same to the Railways and further follow up by NHAI. Efforts made by NHAI to curtail delays were also not specified in the reply.

The impact of delay in obtaining environmental clearance may be understood with the example of Kishangarh-Udaipur-Ahmedabad project. The project for 6-laning was awarded on 22 September 2011 to M/s. GMR Infrastructure Ltd. on BOT (Toll) basis with a concession period of 26 years on an annual premium of ₹ 636 crore with five *per cent* increase every financial year payable by the concessionaire to NHAI. While the project was awarded in September 2011, environmental clearance was obtained much

later in March 2013. Though the scheduled Appointed Date as per CA was 28 May 2011, the date was not fixed so far (March 2014). The concessionaire served termination notice (7 January 2013) on NHAI and the case was sub-judice (March 2014). On the other hand, NHAI stated (June 2013) that at the request of the concessionaire, it had moved a proposal to GoI for rescheduling the premium of ₹ 30000 crore receivable during the entire period of concession, decision on which was awaited. Thus avoidable delay in obtaining environmental clearance/fixing of Appointed Date (till March 2014) deprived NHAI of the revenue of ₹ 1197.80 crore.

5.3 Delay in achieving Financial Closure and Appointed Date.

Financial Closure is the date on which financing documents for funding by lenders becomes effective and the concessionaires get immediate access to such funds. As per Article 48.1 of MCA, financial closure means fulfilment of all conditions precedent to the initial availability of funds under the financing agreements and it is one of the most important condition precedents to be fulfilled by the concessionaires and NHAI. Project expenditure is met by the concessionaire out of equity and loan component. As per clause 24.1.1 of MCA, the financial closure should be achieved within 180 days of signing CA. MCA also provides for penalty to be levied on concessionaires/NHAI for not achieving any of the conditions precedent.

As per Article 48.1 of MCA, appointed date is the date on which financial closure is achieved or an earlier date which both the Parties may determine by mutual consent, and shall be deemed to be the date of commencement of the concession period. All conditions precedent should, however, either be fulfilled or waived before fixing the appointed date.

In 35 out of 94 projects reviewed, audit noticed major delays ranging from 105 days (Zirakpur-Parwanoo) to 568 days (Angul-Sambalpur) in achievement of Financial Closure (**Annexure 1**). Delays were mainly due to non-fulfilment of conditions precedent either by the concessionaire or NHAI or by both. As major portion of project is financed through borrowed funds, any delay in financial closure would only add to the delay in completion of project.

MoRTH admitted (September 2014) delays in the financial closure of various projects. The delays were mainly due to non-fulfilment of the required conditions precedents either by the Concessionaires or by the NHAI or by both. The Ministry therefore feels that the waiver of penalties by mutual consent of both sides is justifiable.

Audit observed that waiving of condition precedent as mentioned in the CAs was not a solution for commencing the projects and was not beneficial for the projects as the same needed to be fulfilled subsequently too. Waiving of conditions precedent (like non handing over of land, non approval of GAD for Railway over bridges, environment clearance etc.), led to extensions of time (EOTs) granted to the concessionaire at a later stage. Such EOTs were granted without levy of damages for delay in completion of

projects on various claims of concessionaire for non fulfilment of conditions by NHAI. Deterrent available in CA, for timely completion of project, in the form of conditions precedent got diluted / removed due to waiving of the conditions precedent, while declaring Appointed Date. This did not help in avoiding delay in completion of projects.

Similarly, Audit noticed major delays ranging from 101 days (Ghaziabad-Aligarh) to 790 days (Barwa Adda- Panagarh) in 37 out of 94 projects reviewed, in achieving the Appointed Date (**Annexure 2**). In 33 (**Annexure 3**), out of 94 projects reviewed, appointed date was fixed after the date of Financial Closure which was in contravention of the terms of MCA.

MoRTH admitted (September 2014) the delays and stated that the delays in Appointed Date are primarily due to delays by NHAI in procurement of conditions precedent as per clause 4.1.2 of the CA such as ROW, Environment and Forest Clearance, clearance from Railways for ROBs etc. In certain cases the Concessionaire also delayed procurement of conditions precedent as per Clause 4.1.3 of the Concession Agreement.

With reference to projects where the Appointed Date was fixed after the date of Financial Closure, MoRTH replied (September 2014) that the definition in the MCA provides for declaration of Appointed Date, either before the Financial Closure, with mutual consent, on the date of Financial Closure, if conditions precedent are satisfied and after the date of Financial Closure, deemed Appointed Date when all conditions precedent are either satisfied or waived. The reply is not acceptable as Article 48.1 of MCA, clearly states that the appointed date is the date on which financial closure is achieved or an earlier date which both the parties may determine by mutual consent, and shall be deemed to be the date of commencement of the concession period.

A few illustrative cases are discussed below:

5.3.1 Surat-Dahisar:

The concessionaire, M/s IRB Surat Dahisar Tollway Pvt. Ltd was to achieve Financial Closure within the 180 days stipulated in CA, i.e., by 27 October 2008. On the concessionaire's request, NHAI allowed extension of 90 days, i.e., up to 27 January 2009 on the ground of 'unprecedented financial crisis in the global market'. The concessionaire did not achieve financial closure even within the extended period of 90 days (28 October 2008 to 27 January 2009). NHAI, however, did not levy penalty of ₹ 7.62 crore for failure of the Concessionaire in achieving the Financial Closure even after extension of time.

MoRTH in their reply stated (September 2014) that due to unprecedented financial crisis in the global market and the constraints which the concessionaires faced at that time from lenders, the extension of period was approved without levy of penalty. Reply of the Ministry is not acceptable as even during the extended period, the concessionaire was unable to achieve Financial Closure.

5.3.2 Gurgaon-Kotputli:

Damages to the tune of ₹ 10.42 crore in Gurgaon-Kotputli project were waived by NHAI on the ground that the concessionaire M/s. Pink City Expressways Private Ltd. faced adverse global/market conditions. The decision of NHAI was beyond the ambit of CA, and gave an undue benefit to the concessionaire.

MoRTH in their reply stated (September 2014) that due to unprecedented financial crisis in the global markets, the Financial Closure date was extended. NHAI justified the extension without levy of damages on the ground that there was delay in issue of user fee notification by MoRTH. However, issuance of fee notification was not one of the conditions precedent as per CA and Appointed Date could have been declared on achieving Financial Closure by concessionaire. As the concessionaire was clearly in default, NHAI's decision to waive damages for delay in achieving financial closure was not in order.

5.3.3 Jhansi-Lalitpur:

As per CA, Financial Closure for the project was to be achieved on 28 March 2007 which was achieved on 14 May 2007, i.e. with a delay of seven weeks. NHAI was to levy a penalty of ₹ 7.55 lakh on the concessionaire, which was not done. MoRTH stated (September 2014) that records relating to the project were not available.

5.3.4 Barhi-Hazaribagh:

As per CA 'Appointed Date' is the date of commencement of concession period from which concessionaire can start construction of the project. In case concessionaire starts construction before Appointed Date, it clearly gives undue benefit to concessionaire in terms of increase in concession period i.e. it can collect toll for more time in BOT (Toll) projects by early completion of construction work.

The Vigilance Wing of NHAI reported (20 September 2011), that in Barhi-Hazaribagh project actual civil work was started by the concessionaire, M/s Abhijeet Hazaribagh Toll Road Ltd., from 28 February 2011 and had achieved 13 *per cent* progress as on 22 July 2011. NHAI had declared appointed date of this stretch as 11 February 2012 with the condition that the value of work done till that date by the concessionaire would be reduced from the concession period of the said stretch. However, the Regional Office of NHAI at Kolkata had proposed (July 2012) to reduce only 93 days from the construction period as well as from the concession period of the project. Hence, the concessionaire was given an undue benefit of extra 255 days (348-93) over and above the concession period of 24 years allowed in CA. The value of toll for the excess period of 255 days worked out to ₹ 16.79 crore. As on 30 September 2013, the project had achieved physical progress of 35.8 *per cent*.

MoRTH stated (September 2014) that the penalty on NHAI and on the concessionaire under clause 4.2, 10.3.2 & 10.3.4 on account of non-fulfilment of condition precedent and delay in Financial Closure was mutually waived off. Therefore, there is no undue benefit to concessionaire in declaring the Appointed Date as on February 2012. The reply given by the Ministry is not complete as no response has been provided to the lacunae in the project pointed out by the Vigilance Wing of NHAI.

5.3.5 Agra- Aligarh

Appointed date for the project was fixed as 18 April 2012 which was revised to 09 October 2012 by NHAI. Though first stage environmental clearance from the Ministry of Environment & Forests (MoEF) was available (16 April 2012) before award date and work relating to grubbing and paving could have been started, the concessionaire, M/s Brij Bhoomi Expressway Pvt. Ltd. did not commence work till September 2012 when second stage environmental clearance was obtained by NHAI. The concessionaire obtained permission from Village Panchayat and Government of Uttar Pradesh for burrowing earth on 23 January 2013 i.e. only after the revised appointed date. Concessionaire had not obtained permission of the State Government for drawing water from river/reservoir and clearance from Village Panchayat and Pollution Control Board for Asphalt Plant till January 2013. Though the concessionaire could have commenced the work (based on first stage environment clearance), rather than levy penalty/damages for failure to achieve conditions precedent, NHAI chose to revise the appointed date to October 2012, which was not in order and amounted to extension of undue favour to the concessionaire.

MoRTH stated (September 2014) that delay in Appointed Date is on account of delay in 2nd stage forest clearance from the MoEF, as permission for tree cutting was given only in October 2012. The reply of MoRTH is not acceptable as work relating to grubbing and paving could have been started even after the first environmental clearance, but as seen during audit, there was delay of six months on the part of the concessionaire in obtaining the second clearance and work began only in October 2012, after fixing of the second date.

5.4 Variations in Total Project Cost (TPC)

While TPC worked out by DPR consultant and approved by NHAI, for a project, inter alia, forms the basis for obtaining approvals of competent authority and for deciding about eligibility of bidders for obtaining RFQ; TPC as worked out by the concessionaire's forms the basis of their bid. In this regard, out of 94 projects reviewed in Audit, two were terminated before financial closure while records were not available in three projects. In 85 of the remaining 89 projects, TPC assessed by the concessionaire was more by ₹ 36612.91 crore as compared to TPC provided in CA (**Annexure 4**). In these 85 projects, the excess TPC worked out by the concessionaire ranged from 0.32 *per cent* (Aurang-

Saraipalli) to 223 *per cent* (Bharuch-Surat). In 25 projects alone, the difference was more than 50 *per cent*.

The higher TPC worked out by the concessionaires allows them to avail higher amount of borrowed funds. Further, in case the project gets terminated because of default of NHAI, it is liable to pay to the concessionaire, by way of termination payment as per Article 37.3.1 of MCA, an amount equal to (a) Debt Due; and (b) 150 *per cent* of the Adjusted Equity. Further, as per the article for termination payments, read with definitions of ‘debt due’ and ‘termination payment’ provided in the above Article, in the event of termination of CA, NHAI would have to pay an amount equal to 90 *per cent* of the debt due and payable, less insurance claim admitted to principal lenders.

MoRTH admitted (September 2014) the fact that there are substantial differences between the TPC mentioned in the Concession Agreements (which are as per the DPR) and the project cost worked out by the concessionaire and lenders in the financial package. The difference between NHAI’s TPC and financial package project cost is mainly due to the fact that the concessionaires worked out their own project cost based on market rates which are bound to vary from the TPC arrived at by NHAI which are generally based on applicable SoR at the time of preparation of Feasibility Report.

The reply is not acceptable as the estimates being worked out for projects in the DPR need to be realistic for successful implementation of the project. However, in 25 cases the difference was more than 50 *per cent*. Further, in case of termination, as NHAI is expected to take over and maintain the project from the concessionaire, higher TPCs allow concessionaires to raise higher quantum of debt. This amounts to passing on the risks of participating in projects to NHAI / bankers. Thus, the residual risk for NHAI increases when the concessionaire avails higher loan funds than envisaged.

5.5 Delays in Completion of Projects

Once the appointed date of the project is fixed, the project is required to be completed within the construction period which is generally 2.5 to 3 years. Delays in completion of projects on the scheduled completion date ranged from six days (Patna-Bakhtiyarpur) to 1249 days (Bangalore– Hoskote – Mulbagul). Out of 94 projects reviewed, though 60 projects (**Annexure-5**) were due to be completed by end of March 2014 or earlier, only five projects were completed in time. The ratio of projects reported to have been completed in time to projects delayed works out to 1:11. Out of the five¹⁴ projects reported to have been completed in time, two projects namely MP/MH Border-Nagpur including construction of Kamptee-Kanhan and Nagpur bypass and Hungud-Hospet were only partially completed (PCC issued on 11 June 2012 and 3 November 2012, respectively) where delay was due to reasons attributable to NHAI/force majeure.

¹⁴ (i) Badarpur elevated highway (ii) MP/MH Border-Nagpur including construction of Kamptee-Kanhan Nagpur Bypass (iii) Vadodra to Bharuch (iv) Kadthal-Armour- package 8 (v) Hongud-Hospet

MoRTH while accepting the facts stated (September 2014) that delay in completion of the projects was mainly due to non-fulfilment of conditions precedent.

5.6 Delay in completion of the 'Punch List' items and non-levy of 'Damages' amounting to ₹ 69.42 crore

As per Article 15.1 of MCA, the project highway shall enter into commercial service on Commercial Operation Date (COD) whereupon the concessionaire shall be entitled to demand and collect fee in accordance with the provisions of Article 27. In the case of 4-laning project, the highway is deemed to have been completed when the completion certificate or the provisional completion certificate (PCC), as the case may be, is issued under Article 14.3 of MCA. Accordingly COD of the project shall be the date on which such completion certificate or the PCC is issued. In 6-laning projects, COD is the Appointed Date of the project.

Article 14 provides that the Independent Consultant/ Independent Engineer may issue PCC after determining that certain tests as provided in Schedule-I (MCA-2011) were successful and if at least 75 per cent of the total length of the project highway had been completed; and the project highway could be safely and reliably placed in commercial operation, though certain works were not yet complete. In such an event, the PCC shall contain a list of outstanding items signed jointly by the IC/IE and the concessionaire (punch list).

MCA further provides that all items in the punch list shall be completed by the concessionaire within 90/120 days (as per relevant CA) of the date of issue of PCC and for any delay thereafter, other than for reasons solely attributable to NHAI or due to *force majeure*, NHAI shall be entitled to recover damages from the concessionaire to be calculated and paid for each day of delay, until all items are completed, at the prescribed rate of the cost of completing such items as estimated by the IC/IE as specified in the Agreement. Subject to payment of such damages, the concessionaire shall be entitled to a further period not exceeding 120/180 days (as per relevant CA) for completion of punch list items. Failure of the concessionaire to complete all punch list items within the time set forth in CA for any reason, other than conditions constituting *force majeure* or for reasons solely attributable to NHAI, shall entitle NHAI to terminate the Agreement.

It was seen that out of 94 projects reviewed, PCC was issued in 33 completed projects with punch list items. Projects/punch list items were not completed within the stipulated period of 90/120 days. Action to levy damages of ₹ 69.42 crore in 13 projects was not taken by NHAI which also did not issue termination notice for delay beyond 90/120 days of cure period as per CA. **(Annexure 6).**

MoRTH replied (September 2014) that a penalty of ₹ 56 lakh had been recovered in three¹⁵ projects and penalty could not be levied in the Lalitpur-Jhansi project and Jalandhar-Amritsar project as the punch list items could not be completed due to non-availability of required land. In the case of Bara-Orai project it was replied that the Concessionaire had completed the punch list items, though beyond the stipulated period. As there was no provision of penalty in CA, penalty amounting to ₹ 19.38 crore was not levied. In seven cases the decision of levy of damages is under consideration by NHAI.

The fact remains that NHAI needed to critically review the existing monitoring mechanism of implementation of projects with specific reference to the provision and levy of penalty on delinquent and defaulting concessionaires.

5.7 Extra burden amounting to ₹ 161.67 crore on road users due to partial tolling on incomplete stretch

The MCA issued in November 2005 allowed collection of toll after 75 *per cent* length of the project highway was complete. However for PPP projects approved till then, the concessionaire was entitled to collect fees from users of project highway only after completing at least 50 km of continuous stretch. CA further provided that MoRTH would issue fee notification within 90 days of probable completion date of continuous stretch of at least 50 km and/or the commercial operating date (COD) of the project highway. In the event of issuing PCC, the concessionaire is also allowed to start collecting toll on the partially completed stretch. However, as per provisions of CA, in case the concessionaire defaults in completing the entire project highway within the schedule project completion date, any fee notification issued earlier for levy of toll on the part completion, would be de-notified immediately. Fresh fee notification would be issued only after completion of the entire project highway.

In four¹⁶ out of 94 projects reviewed by Audit, where the condition of 50 km continuous stretch was applicable, it was observed that despite the projects not being completed on scheduled completion dates, the earlier fee notification was not de-notified as per the clauses of CA and the concessionaires were allowed to collect toll amounting to ₹161.67 crore on partially completed stretches. **(Annexure 7)**

MoRTH has stated (September 2014) in the case of Lucknow-Sitapur and Meerut-Muzaffarnagar projects, EOTs were granted to concessionaires for various reasons like not handing over land, etc. and therefore allowing tolling on a partial stretch was regular. In the case of Jaipur-Mahua, NHAI stated that EOT was granted and the amount of partial toll collection kept in a separate sub account i.e. damages payment sub-account based on the supplementary agreement dated 09 September 2009.

¹⁵ (i) Meerut-Mujaffarnagar (₹0.14 crore) (ii) Mahua-Jaipur (₹0.14 crore) (iii) Lucknow-Sitapur (₹0.28 crore)

¹⁶ (i) Meerut-Muzaffarnagar (ii) Mahua-Jaipur (iii) Lucknow-Sitapur (iv) Vadape-Gonde

The reply of MoRTH is not acceptable as partial tolling was in contravention to CA (clause 6.1) and resulted in undue benefit to the concessionaire. Further, the reply also needs to be viewed against the fact that toll collection on a partially completed stretch is an incentive to the concessionaire to complete the project highway within the scheduled time and nowhere in the CAs, it is mentioned that partial tolling is allowed even if the projects get delayed. NHAI has accepted that there is no provision in CA for granting EOT. Thus, allowing the concessionaire to collect toll in such cases was not only a violation of the CAs but places avoidable burden on road users.

5.8 Non-transfer of toll to “Withheld Amount Account”

Article 31.3.1A of the CAs for 6-laning projects provides that in case the concessionaire defaults in achieving the milestones, the toll collected from the day following the date of such defaulted milestone will be deposited in an escrow account (withheld amount account) and such withheld amount will not be released till such time that the defaulted milestones have been achieved and the project milestone falling immediately after the latest defaulted milestone is achieved in time. It further states that interest accrued on the withheld amount shall be disbursed to NHAI under all circumstances.

Out of 20 number of 6-laning projects examined in Audit, in three projects toll amounting to ₹ 902.89 crore as detailed below was not withheld or was prematurely released to the concessionaire.

In case of Delhi-Agra project, no such provision was included in CA.

TABLE 10: Non-transfer of toll to withheld amount account

Project	Toll not withheld (₹ in crore)	Audit Observations
Gurgaon-Jaipur	459.87	<p>As per Schedule G of CA, concessionaire had to achieve project milestone II within 730 days (2 April 2011) from Appointed Date and scheduled 6-laning date on 912th day (i.e. 2 October 2011) from the Appointed Date. Project milestone II had not been achieved till August 2013 though the scheduled 6-laning date (i.e. 2 October 2011) was over. As per CA, if the project milestones were not achieved in time, the toll collected was to be withheld in separate sub escrow account. However, NHAI did not withhold an amount of ₹ 459.87 crore collected by the concessionaire, M/s. Pink City Expressways Private Ltd. NHAI also sustained loss of interest that would have been earned had the amount been withheld as per Clause 31 of CA.</p> <p>MoRTH stated (September 2014) that the concessionaire is eligible for further EOT as entire work front is not available. The EOT for COD is under consideration of NHAI.</p> <p>MoRTH reply is not acceptable because as per article 31.3.1A of the CA, in case the Concessionaire defaults in achieving the milestones, the toll collected by him from the day following the date of such defaulted milestone will be deposited in an Escrow Account (Withheld Amount Account) and such withheld amount will not be released till such time that the defaulted milestones have been achieved and the project milestone falling immediately after the latest defaulted milestone have been achieved in time.</p>

Project	Toll not withheld (₹ in crore)	Audit Observations
Varanasi-Aurangabad	181.24	As per CA, the concessionaire had to achieve project milestone I within 255 days (i.e. on 23 May 2012) from the Appointed Date. Though the concessionaire, M/s. SOMA ISOLUX Varanasi Aurangabad Tollway Private Ltd., had not achieved Milestone-I as of October 2012, NHAI had not withheld toll collection of ₹ 181.25 crore (up to April 2013). NHAI also lost interest on the said amount to which it was entitled. MoRTH in their reply stated (September 2014) that at present the matter is sub-judice.
Panipat-Jalandhar	261.78	<p>Article 31.3.1A (iv) of the CA stipulated that withheld amount of toll can be released only if the project milestone falling immediately after the last defaulted milestone is achieved by the concessionaire. On not achieving the second milestone by the concessionaire, considering recommendation of IE/PD/RO NHAI rescheduled the date of second milestone and granted extension of time for 219 days (i.e. upto 16 December 2011) to the concessionaire. Though, NHAI initially withheld an amount of ₹ 261.78 crore collected as toll for the period from 17 December 2011 to March 2013 due to non achieving of second milestones by 16 December 2011, the same was released (March 2013) to the concessionaire (M/s. Soma Isolux NH One Tollway Private Ltd.), even as the third and final milestone (i.e. immediately following the second milestone) which was due for completion on 31 March 2013, was also not achieved. Apart from undue benefit to the concessionaire, NHAI also lost interest on the said amount.</p> <p>MoRTH stated (September 2014) that the withheld toll was released once the EOT is granted.</p> <p>Audit in this regard observed that there is no clause for granting EOT in the concession agreement and secondly, MoRTH has not commented on the Article 31.3.1A(iv) of CA which provides that withheld amount of toll can be released only if the project milestone falling immediately after the last defaulted milestone (i.e. third / final milestone) is achieved by the concessionaire. The third/final milestone was scheduled to be achieved on or before 30 March 2014. Thus, release of withheld amount for the period from 17-12-2011 to March 2013 was in contravention to CA.</p>
Delhi-Agra	NA	<p>The appointed date was fixed as 16 October 2012 at the request of concessionaire (January and February 2012) by signing inventory of 80 <i>per cent</i> of land. Concessionaire made a false declaration of mobilising at site whereas no machinery and plant were mobilised at two of the construction camps at km 54.000 and 170.000. There was no record of any action taken by NHAI against the concessionaire for failure to mobilise and commence construction of the project. Concessionaire claimed (June 2013) that only five <i>per cent</i> of land was available for upgradation. Non mobilisation and not obtaining various clearances viz. tree cutting/NOC from Pollution Control Board were also pending due to which work could not be started. Progress of work against the first milestone due on 27 June 2013 was 'nil'.</p> <p>In this project, clause 31.3.1A, available in other¹⁷ 6-laning CA's for withholding the toll collection in case of failure to achieve milestones, was deleted from CA. By the end of August 2013, the concessionaire had collected toll amounting to ₹ 120 crore and utilised an amount of ₹ 78.32 crore in investment in liquid funds.</p> <p>MoRTH stated (September 2014) that the matter is under examination.</p>
TOTAL	902.89	

¹⁷ For example Pune-Satara, Panipat-Jalandhar, Gurgaon-Kotputli-Jaipur and Varanasi-Aurangabad

It was not possible to ascertain details regarding crediting the amount of interest on the withheld amount to NHAI, as there was no record in support, in NHAI.

The reply ignores the fact that in spite of numerous defaults on their part, concessionaires were allowed to collect toll on such roads which amounted to users being charged for roads which were not in a state of full operation and hence without improvement in travel quality.

Further, in the 'Exit Conference' held on 22 July 2014 with the MoRTH and NHAI, Member (Finance), NHAI accepted the audit observation. Secretary, MoRTH and Additional Secretary & Financial Advisor, MoRTH advised NHAI to take a serious view in the case of Delhi-Agra project.

5.9 Change of Scope (CoS)

Article 16.1 of MCA provides that NHAI may require at any time during execution of work, to execute additional works and services which are not included in the scope of the project. Similarly, the concessionaire may request NHAI for change of scope, for providing safer and improved services to users. Such changes of scope are to be made within the provisions of CA. All the costs arising out of any change of scope during the Concession period are to be borne by the concessionaire subject to ceiling, limited to certain *per cent* of the project cost (as mentioned in the clauses of CA) and any excess expenditure is to be reimbursed by NHAI. Where NHAI/concessionaire incur any expenditure on change of scope (CoS) due to site conditions, public demand and VVIP reference, such CoS is unavoidable.

Out of 94 projects examined, CoS was observed in 23 projects (**Annexure 8**). The financial impact of positive and negative CoS¹⁸ (net of ceiling prescribed in the respective CAs) works out to ₹ 856.80 crore in 22 projects and ₹ 37.72 crore in 6 projects, respectively.

Reasons for positive CoS amounting to ₹856.80 crore were as under:

- Due to site conditions – ₹ 59.65 crore (in 6 projects)¹⁹
- Due to public demand and VVIP reference – ₹134.62 crore (in 11 projects)²⁰

¹⁸ Positive CoS means additional works and services is required which were not included in the scope of work and negative CoS means reduction in scope of works and services to be executed.

¹⁹ (1) Badarpur elevated highway ₹3.54 crore (2) MP/MH border-Nagpur including construction of Kamptee Kanhan-Nagpur Bypass ₹0.97 crore, (3) Meerut-Muzaffarnagar ₹9.45 crore, (4) Indore- Jambua ₹7.93 crore, (5) Padalur-Trichy ₹37.41 crore, (6) Silk Board Junction ₹0.35 crore.

²⁰ (1) Gorakhpur Bypass ₹12.49 crore, (2) Jalandhar-Amritsar ₹11.58 crore, (3) Bara-Orai ₹0.38 crore, (4) Panipat-Jalandhar ₹33.65 crore, (5) Nagpur-Betul ₹12.47 crore, (6) Pimpalgaon-Gonde ₹2.12 crore, (7) MP border-Dhule ₹39.88 crore, (8) Madurai-Tuticorin ₹18.41 crore, (9) Silk Board Junction to electronic city ₹0.49 crore, (10) Islam Nagar-Kadtal ₹0.42 crore and (11) Kadtal-Armoor ₹2.73 crore.

- Due to DPR proposal not included in CA – ₹ 334.73 crore (in 2 projects)²¹
- Due to Faulty DPR – ₹ 327.80 crore (in 5 projects)²²

In the case of negative CoS (mostly due to site conditions and public resistance), NHAI needed to recover / adjust an amount of ₹ 37.72 crore²³ from concessionaire details of which were awaited from NHAI.

MoRTH stated (September 2014) that necessary follow-up action to make the DPR realistic is being taken by NHAI. MoRTH further stated that increasing the amount of performance BG of the DPR consultant is under consideration so that adequate penalties could be levied in case of defective DPRs.

5.10 Cost of Utility Shifting

As per Article 11.2 of MCA, the shifting of utility work like electricity lines, water pipe lines, telephone lines etc., shall be carried by the concessionaire, subject to applicable laws and with the assistance of NHAI. Based on the estimates prepared by the respective State Government agencies, the work is got done by concessionaire and the cost of work is reimbursed by NHAI to the concessionaire. Audit examination revealed wide variations between the cost estimated for such shifting by the DPR/FR consultant and the actual cost incurred by concessionaires.

Out of the 94 projects reviewed in Audit, five projects were terminated/under termination while appointed date was not declared in four projects (March 2014). In 71 out of the remaining 85 projects, where work of ‘utility shifting’ had progressed sufficiently for actual costs to be available, such variation ranged from 2.34 *per cent* (Aurang-Saraipalli) to 2831.43 *per cent* (Zirakpur-Parwanoo) (**Annexure 9**). Of these 71 projects, in 34 projects, the variation was more than 100 *per cent*. Audit is of the view that instead of reimbursing the actual cost to the concessionaire, the TPC for the project itself should include the estimated cost of utility shifting too, in order to avoid large outgo and vast variation between estimated and actual cost of execution.

The issue was discussed in the ‘Exit Conference’ held with MoRTH and NHAI on 22 July 2014, where it was stated that follow up action is being taken by NHAI. It was agreed that the required utility shifting in DPR should be worked out on realistic basis and TPC of the project should also include the estimates of utility shifting at the time of bidding on the risk and cost of the concessionaire.

²¹ (1) Jaipur-Deoli (₹ 7.4 crore) and 2) Pune-Satara (₹ 327.33 crore).

²² 1) Zhirakpur-Parwanoo ₹ 159.53 crore, (2) Gurgaon-Jaipur ₹ 101.41 crore, (3) Vadape-Gonde ₹ 56.54 crore, (4) Pune-Solapur ₹ 9.5 crore and (5) Silk Board junction to electronic city ₹ 0.82 crore.

²³ (1) Meerut-Muzaffarnagar ₹ 3.46 crore, (2) Jaipur-Mahua ₹ 0.89 crore, (3) Bara-Orai ₹ 4.54 crore, (4) Madurai-Tuticorin ₹ 17.44 crore, (5) Islamnagar-Kadtal ₹ 7.62 crore and (6) Kadtal-Armoor ₹ 3.77 crore.

Recommendation 7: NHAI may increase the effectiveness of its Land Acquisition Units so that land can be handed over within the scheduled time and projects can also be completed without delay.

Recommendation 8: NHAI may consider including the estimated cost of utility shifting in the TPC for the project itself rather than reimbursing the cost of execution to the concessionaire in order to avoid large variations.